

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3  
4 SUMMARY ORDER

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6 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER  
7 AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY  
8 OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY  
9 OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR  
10 IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.  
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12 At a stated term of the United States Court of Appeals for the Second Circuit, held at the  
13 Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the  
14 16th day of August, two thousand and six.

15  
16 PRESENT:

17  
18 HON. BARRINGTON D. PARKER,  
19 HON. RICHARD C. WESLEY,  
20 HON. PETER W. HALL,  
21

22 *Circuit Judges.*  
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24

25  
26 UNITED STATES OF AMERICA,  
27

28 *Appellee,*

29  
30 v.

**SUMMARY ORDER**  
No. 05-5639-cr

31  
32 ENNIO NEMESIO ESTEBAN-GOMEZ,  
33

34 *Defendant-Appellant.*  
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36

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38 Counsel for Appellant: Philip L. Weinstein, Federal Defenders of New York, Inc., New  
39 York, NY.

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41 Counsel for Appellee: Allen L. Bode (Alyssa A. Qualls, on the brief) Assistant United  
42 States Attorneys, *for* Roslynn R. Mauskopf, United States Attorney  
43 of the Eastern District of New York, New York, NY.

1 Appeal from a judgment of the United States District Court for the Eastern District of  
2 New York (Sandra J. Feuerstein, *Judge*).  
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4 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**  
5 **DECREEED that the judgment be hereby VACATED and the matter REMANDED for**  
6 **resentencing in accordance with this Order.**  
7

8 Ennio Nemesio Esteban-Gomez appeals from a judgment of conviction entered in the  
9 United States District Court for the Eastern District of New York (Feuerstein, *J.*), following his  
10 plea of guilty to one count of illegal reentry into the United States after deportation, in violation  
11 of 8 U.S.C. §§ 1326(a) and (b)(1). In an upward departure from the imprisonment range  
12 prescribed by the federal Sentencing Guidelines (“Guidelines”), Esteban-Gomez was sentenced  
13 to 120 months imprisonment. We assume familiarity with the underlying facts and procedural  
14 history.

15 On appeal, Esteban-Gomez argues principally (1) his prior illegal reentry conviction was  
16 erroneously classified as an aggravated felony, resulting in an eight-point increase in his  
17 Guidelines calculation, and (2) the extent of the upward departure was neither justified nor  
18 reasonable and the sentence was unreasonable pursuant 18 U.S.C. § 3553(a). The government  
19 agrees that, because the advisory Guidelines range set forth in the Presentence Report was  
20 incorrectly calculated, this case should be remanded for resentencing.

21 As Esteban-Gomez correctly notes, an eight-level enhancement pursuant to  
22 § 2L1.2(b)(1)(C) applies only where the defendant was originally deported after a conviction for  
23 an aggravated felony as defined in 8 U.S.C. § 1101(a)(43). *See* U.S.S.G. § 2L1.2, cmt. (n.3A).  
24 Here, following two administrative deportations in 1988, Esteban-Gomez was deported in 1992  
25 for a third time as a result of his illegal reentry, not as a result of the commission of an

1 aggravated felony. The government agrees with Esteban-Gomez that the applicable advisory  
2 Guidelines range should have been 21 to 27 months imprisonment.

3 Given the government's concession, we vacate the judgment and remand for  
4 resentencing. Since appellant's sentence is vacated, we decline appellant's invitation to review  
5 its reasonableness or reassign this case at this time. We are confident that, on resentencing, the  
6 district court judge will give appropriate consideration to the Guidelines, the § 3553(a) factors, as  
7 well as others, that might or might not justify a significant departure from the advisory  
8 Guidelines.

9 We have considered all other arguments and find them to be without merit. For the  
10 foregoing reasons, we REMAND to the district court with instructions to VACATE appellant's  
11 sentence, and conduct resentencing consistent with *United States v. Booker*, 543 U.S. 220 (2005)  
12 and this order.

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14 FOR THE COURT:

15  
16 Roseann B. MacKechnie  
17 Clerk of Court  
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19  
20 By: \_\_\_\_\_